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8 IN THE UNITED STATES DISTRICT COURT
9 FOR THE DISTRICT OF OREGON

10 JOHN M. MORGAN,

Civil No. 07-6286-AA
OPINION AND ORDER

11 Plaintiff,

12 vs.

13 MICHAEL J. ASTRUE,
Commissioner of Social Security,
14 Defendant.

15
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27 AIKEN, Judge:

28 Claimant, John Morgan, brings this action pursuant to the

1 Social Security Act (the Act), 42 U.S.C. §§ 405(g) and
2 1383(c)(3), to obtain judicial review of a final decision of the
3 Commissioner denying his application for disability insurance
4 benefits (DIB) under Title II of the Act and for Supplemental
5 Security Income (SSI) disability benefits under Title XVI of the
6 Act. For the reasons set forth below, the Commissioner's
7 decision is reversed and remanded for payment of benefits.

8 **PROCEDURAL BACKGROUND**

9 Plaintiff applied for DIB and SSI on October 21, 2003,
10 alleging disability beginning September 5, 2001¹. Tr. 484.
11 Plaintiff's application was denied initially and upon
12 reconsideration. Plaintiff requested a hearing before an ALJ
13 which was held on October 6, 2005. Tr. 684. On February 24,
14 2006, the ALJ found plaintiff not disabled. Tr. 20. On August
15 8, 2007, the Appeals Council denied plaintiff's request for
16 review. Therefore, the ALJ's decision became the final agency
17 decision from which plaintiff seeks judicial review.

18 **STATEMENT OF THE FACTS**

19 At the time of the hearing, plaintiff was 47 years old and
20 had graduated from high school. Tr. 708. Plaintiff had past
21 relevant work experience as a city maintenance worker and lumber
22 handler/sales. Tr. 707-08.

23 **STANDARD OF REVIEW**

24 This court must affirm the Secretary's decision if it is
25

26 ¹ Plaintiff filed a previous claim that was denied by the
27 Administrative Law Judge (ALJ) on February 24, 2003. Tr. 20,
28 54-65. The Appeals Council denied review and plaintiff did
not appeal. Therefore, the relevant period at issue here
commences February 25, 2003.

1 based on proper legal standards and the findings are supported by
2 substantial evidence in the record. Hammock v. Bowen, 879 F.2d
3 498, 501 (9th Cir. 1989). Substantial evidence is "more than a
4 mere scintilla. It means such relevant evidence as a reasonable
5 mind might accept as adequate to support a conclusion."
6 Richardson v. Perales, 402 U.S. 389, 401 (1971) (quoting
7 Consolidated Edison Co. v. N.L.R.B., 305 U.S. 197, 229 (1938)).
8 The court must weigh "both the evidence that supports and
9 detracts from the Secretary's conclusions." Martinez v. Heckler,
10 807 F.2d 771, 772 (9th Cir. 1986).

11 The initial burden of proof rests upon the claimant to
12 establish disability. Howard v. Heckler, 782 F.2d 1484, 1486
13 (9th Cir. 1986). To meet this burden, plaintiff must demonstrate
14 an "inability to engage in any substantial gainful activity by
15 reason of any medically determinable physical or mental
16 impairment which can be expected . . . to last for a continuous
17 period of not less than 12 months. . . ." 42 U.S.C.
18 § 423(d)(1)(A).

19 The Secretary has established a five-step sequential
20 process for determining whether a person is disabled. Bowen v.
21 Yuckert, 482 U.S. 137, 140 (1987); 20 C.F.R. §§ 404.1502,
22 416.920. First the Secretary determines whether a claimant is
23 engaged in "substantial gainful activity." If so, the claimant
24 is not disabled. Yuckert, 482 U.S. at 140; 20 C.F.R.
25 §§ 404.1520(b), 416.920(b).

26 In step two the Secretary determines whether the claimant
27 has a "medically severe impairment or combination of
28 impairments." Yuckert, 482 U.S. at 140-41; see 20 C.F.R.

1 §§ 404.1520(c), 416.920(c). If not, the claimant is not
2 disabled.

3 In step three the Secretary determines whether the
4 impairment meets or equals "one of a number of listed impairments
5 that the Secretary acknowledges are so severe as to preclude
6 substantial gainful activity." Id.; see 20 C.F.R.

7 §§ 404.1520(d), 416.920(d). If so, the claimant is conclusively
8 presumed disabled; if not, the Secretary proceeds to step four.
9 Yuckert, 482 U.S. at 141.

10 In step four the Secretary determines whether the claimant
11 can still perform "past relevant work." 20 C.F.R.

12 §§ 404.1520(e), 416.920(e). If the claimant can work, she is not
13 disabled. If she cannot perform past relevant work, the burden
14 shifts to the Secretary. In step five, the Secretary must
15 establish that the claimant can perform other work. Yuckert, 482
16 U.S. at 141-42; see 20 C.F.R. §§ 404.1520(e) & (f), 416.920(e) &
17 (f). If the Secretary meets this burden and proves that the
18 claimant is able to perform other work which exists in the
19 national economy, she is not disabled. 20 C.F.R. §§ 404.1566,
20 416.966.

21 DISCUSSION

22 1. The ALJ's Findings

23 At step one of the sequential process outlined above, the
24 ALJ found that plaintiff had not engaged in substantial gainful
25 activity since his alleged disability onset date. Tr. 28. See
26 20 C.F.R. §§ 404.1520(b), 416.920(b). At step two, the ALJ found
27 that plaintiff had the following severe impairments: insulin
28 dependent diabetes mellitus and degenerative disc disease of the

1 lumbar spine. Tr. 28. See 20 C.F.R. §§ 404.1520(c), 416.920(c).
2 At step three, the ALJ found that plaintiff's impairments did not
3 meet or equal the requirements of a listed impairment. Tr. 28.
4 See 20 C.F.R.
5 §§ 404.1520(a)(4)(iii), 404.1520(d).

6 The ALJ next determined that plaintiff had the residual
7 functional capacity to perform a reduced range of light and
8 sedentary work, with the limitation that he was precluded from
9 performing frequent bilateral fingering. Tr. 28. See 20 C.F.R.
10 §§ 404.1520(e), 404.1545, 416.920(e), 416.945. At step four the
11 ALJ found that plaintiff was unable to perform his past relevant
12 work within the residual functional capacity limitations noted
13 above. Tr. 28. See 20 C.F.R. §§ 404.1520(a)(4)(iv),
14 404.1520(f), 416.920(a)(4)(iv), 416.920(f).

15 Finally, at step five, the ALJ found that plaintiff could
16 perform other work existing in significant numbers in the
17 national economy. These occupations included bench order clerk,
18 charge account clerk, and bindery machine feeder, each with over
19 60,000 jobs available in the national economy. Tr. 29. See 20
20 C.F.R. §§ 404.1520(a)(4)(v), 404.1520(g), 416.920(a)(4)(v),
21 416.920(g). Therefore, the ALJ found plaintiff not disabled.

22 2. Plaintiff's Allegations of Error

23 A. Plaintiff's Credibility

24 Plaintiff argues that the ALJ erred when he rejected
25 plaintiff's testimony and found him not credible. Where, as
26 here, plaintiff has medically documented severe impairments that
27 could reasonably be expected to produce some degree of the
28 symptoms plaintiff complains of, "the ALJ may reject the

1 claimant's testimony regarding the severity of his symptoms only
2 if he makes specific findings stating clear and convincing
3 reasons for doing so." Smolen v. Chater 80 F.3d 1273, 1284 (9th
4 Cir. 1996). To reject plaintiff's subjective claims, once the
5 plaintiff establishes the existence of an impairment and a causal
6 relationship between the impairment and some level of symptoms,
7 the ALJ must provide clear and convincing reasons, supported by
8 substantial evidence. Morgan v. Commissioner, 169 F.3d 595, 599
9 (9th Cir. 1999).

10 Here, there is no dispute that plaintiff had impairments
11 that could reasonably be expected to cause some degree of
12 symptoms. Therefore, the ALJ must cite clear and convincing
13 reasons for disbelieving that plaintiff's impairments were as
14 disabling as he alleged. The ALJ cited the following two
15 reasons: (1) as of June 7, 2005, according to plaintiff's doctor,
16 he was "doing better on all scores" than he had been previously,
17 when his doctor limited him to being "unable to work on any heavy
18 physical type things." Tr. 26-26, 335, 585; and (2) plaintiff's
19 lack of motivation to work as demonstrated by his not attempting
20 to find less strenuous work than his prior work with the City of
21 Port Orford. Tr. 25.

22 I disagree that these two reasons provide "clear and
23 convincing reasons" based on substantial evidence in the record
24 to reject plaintiff's testimony. Even assuming plaintiff's
25 condition had improved by June 7, 2005, this observation fails to
26 address plaintiff's condition during the entire period at issue,
27 beginning February 25, 2003, through February 24, 2006.
28 Moreover, the record shows that prior to plaintiff's June 2005

1 appointment, plaintiff had been doing very poor. In relation to
2 Dr. Williams' "doing better" comment, Dr. Williams noted that
3 previously plaintiff had been suffering from sinusitis, a tooth
4 extraction, diabetes, arteriosclerotic cardiovascular disease and
5 hypertension. Tr. 646. Further, on September 8, 2005, plaintiff
6 reported a significant amount of pain from his peripheral
7 neuropathy. Tr. 669. Dr. Williams described his as suffering
8 from "severe peripheral neuropathy with secondary pain." Id.
9 Dr. Williams' comment that plaintiff was "doing better" when
10 taken in context is not substantial evidence to reject
11 plaintiff's testimony.

12 Next, considering the ALJ's comment regarding plaintiff's
13 "lack of motivation" to find less strenuous work than his prior
14 job with the City of Port Orford, I find plaintiff's failure to
15 find other employment is reasonable when considering his severe
16 impairments - all fully supported by the record and his treating
17 doctor. Plaintiff testified that his blood sugar level
18 fluctuates on a daily basis causing fatigue. Tr. 702. He
19 further testified that approximately three to four times per
20 month, he has a low blood sugar level episode that results in
21 disorientation. Tr. 712. It takes about 30 minutes for his
22 blood sugar level to return to normal. Id. The ALJ failed to
23 give any reasons for rejecting this testimony, nor did he credit
24 it. Plaintiff's treating doctor confirmed that plaintiff has
25 difficulty controlling his blood sugar level and that it takes
26 approximately 30 minutes to recover from a high or low blood
27 sugar episode. Tr. 672.

28 In crediting plaintiff's testimony, plaintiff must be found

1 disabled based on the testimony and opinion of the Vocational
2 Expert (VE). The VE testified that unscheduled daily work
3 breaks, for fatigue or low blood sugar level episodes, would
4 preclude employment. Tr. 713-14.

5 B. Treating Doctor's Opinion

6 Plaintiff next argues that the ALJ erred in failing to
7 provide clear and convincing reasons for rejecting the opinion of
8 Dr. Williams, plaintiff's treating doctor. Dr. Williams stated
9 in 2005, that since 2004, plaintiff's diabetic neuropathy and his
10 diabetes had "continued to worsen to the point where I feel, at
11 this time, patient is not employable in any way." Tr. 644. The
12 ALJ rejected that opinion as inconsistent with prior medical
13 evidence. The examples of that inconsistency cited by the ALJ
14 include Dr. Williams' statement that plaintiff is "doing better
15 on all scores," tr. 646, and a reference to a November 12, 2001,
16 visit with Dr. Williams where Dr. Williams actually opined that,
17 "[h]e cannot continue to work, and I agree. His work of eight
18 hours per day standing on his feet is something he will not be
19 able to do." Tr. 585. I disagree that these statements by Dr.
20 Williams qualify as prior inconsistent medical evidence. In
21 January 2004, Dr. Williams found that plaintiff "has significant
22 problems with peripheral neuropathy and pain that makes it so it
23 is very difficult for him to do any kind of physical activity."
24 Tr. 624. A few months later, Dr. Williams found that plaintiff
25 was "restricted to a more sedentary type of work." Tr. 642.
26 Finally, in May 2005, Dr. Williams stated that plaintiff's
27 diabetic neuropathy and diabetes had continued to worsen to the
28 point where he was "not employable in any way." Tr. 644. Dr.


1 Williams' opinion as plaintiff's treating doctor should be
2 credited.

3 CONCLUSION

4 The Commissioner's decision is not based on substantial
5 evidence. Therefore, this case is reversed and remanded for
6 payment of benefits. This case is dismissed.

7 IT IS SO ORDERED.

8 Dated this 1 day of October 2008.

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12 _____
13 Ann Aiken
14 United States District Judge
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